

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

ANTHONY ENRIQUE ORTEGA,)
)
)
Petitioner,)
)
)
vs.) **Case No. CIV-11-185-HE**
)
)
MIKE ADDISON, Warden,¹)
)
)
Respondent.)

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing *pro se*, has filed a motion for leave to proceed *in forma pauperis* and supporting affidavit. Pursuant to an order entered by United States District Judge Joe H. Heaton, this matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). Having reviewed said motion, the undersigned finds that Petitioner has sufficient funds to prepay the filing fee of \$5. Because he does not qualify for authorization to proceed without prepayment of the filing fee, it is recommended that Petitioner's motion [Doc. No. 2] be denied and that he be ordered to prepay the full \$5 filing fee for this action to proceed. 28 U.S.C. § 1915(a)(1). See Lister v. Department of the Treasury, 408 F.3d 1309, 1312 (10th Cir. 2005) (magistrate judge should have issued a report and recommendation, recommending denial of the motion to proceed *in forma pauperis*.). It is further recommended that unless Petitioner pays the \$5

¹The Petitioner has also listed the Oklahoma Attorney General as a Respondent. However, the state officer having custody of the applicant is the properly named respondent. See Rule 2, Rules Governing Section 2254 Cases in the United States District Courts. Therefore, the Oklahoma Attorney General is dismissed as a Respondent.

filings fee in full to the Clerk of the Court within fifteen (15) days of any order adopting this Report and Recommendation, this action be dismissed without prejudice to refiling.

However, the Petitioner is advised that even if he pays the \$5.00 filing fee, the undersigned will recommend that the case be **transferred** to the U.S. District Court for the Eastern District of Oklahoma as the undersigned finds, for the reasons stated below, that the petition would more properly be adjudicated in that court. Therefore, rather than paying the filing fee in this Court, Petitioner may instead choose to refile this action in that court.

By this action, Petitioner attempts to attack his convictions of Lewd Molestation, Count I, Child Sexual Abuse, Count II and First Degree Rape, Count III, Case No. CF-2005-488, District Court of Bryan County. Since the Petitioner attacks his convictions from the District Court of Bryan County, which is located within the Eastern District of Oklahoma, 28 U.S.C. § 116(b), and since he is incarcerated in the Joseph Harp Correctional Center which is located in Lexington, in the Western District of Oklahoma, both federal courts have jurisdiction to entertain this habeas petition. 28 U.S.C. §2241(d). However, it has been a long standing policy of this Court and the U.S. District Court for the Eastern District of Oklahoma that justice is normally better served by the adjudication of a habeas petition in the district where the conviction was entered since that is where the trial court officials and records are located, where trial counsel for the prosecution and the Petitioner are ostensibly available and where any necessary witnesses usually reside. Thus, rather than paying the filing fee in this Court, Petitioner might instead choose to refile this action in the U.S. District Court for the Eastern District of Oklahoma. Petitioner is advised of his right to file an

objection to this Report and Recommendation in accordance with Fed. R. Civ. P. 72(b)(2).

Any such objection must be filed with the Clerk of this Court by the 21st day of March, 2011.

Petitioner is further advised that failure to timely object to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. Moore v. United States, 950 F. 2d 656 (10th Cir. 1991). The Clerk is hereby ordered not to forward a copy of the petition to the appropriate state agency until further order of the Court

ENTERED this 28th day of February, 2011.



DOYLE W. ARGO
UNITED STATES MAGISTRATE JUDGE